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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

No.

T. SMITH & SON, INC.,
Petitioner,

versus

WILLIE WILSON and P. J. DONOVAN,
Deputy Commissioner,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 3, 1964.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals dated March 3, 1964, printed in Appendix A hereto, infra, p. 1a, is reported at 328 F 2d 313. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 218 F. Supp. 944, printed in Appendix C hereto, infra, p. 5a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1964 and is printed in Appendix B hereto, infra, p. 3a. A petition for rehearing was filed which, by order entered April 3, 1964, printed in Appendix E hereto, infra, p. 12a, was denied by the Court of Appeals. Pursuant to an application for a stay of the mandate of the Court, the United States Court of Appeals for the Fifth Circuit, by order entered April 10, 1964, stayed the issuance of the mandate for a period of thirty days thereafter.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Did the institution of a proceeding in a State Court of Louisiana asserting a claim for benefits under the Louisiana Workmen's Compensation Act constitute a "suit for damages" as contemplated by Section 913(d) of Title 33, United States Code and toll the one year statute of limitation period imposed upon the filing of claims in Section 913(a) of Title 33, United States Code?

STATUTES INVOLVED

Section 913(a) of Title 33, United States Code provides:

> "The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after

the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred."

Section 913(d) of Title 33, United States Code states:

"When recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit."

Section 905 of Title 33, United States Code provides:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents,

next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an acion at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

STATEMENT OF THE CASE

Summary Statement

These proceedings originated in the United States District Court for the Eastern District of Louisiana upon a complaint of respondent, Willie Wilson, to review and set aside as not in accordance with law a compensation order filed by Mr. P. J. Donovan, Deputy Commissioner for the Seventh Compensation District, Bureau of Employees' Compensation, United States Department of Labor, in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq., in which the Deputy Commissioner found that the claim of respondent for additional compensation had not been filed within the time provided therefor by the afore-

said Act. The complaint represented that the operation of the statutory period of limitation with respect to the time for filing claims set out in 33 U.S.C. 913(a) was suspended by respondent's claim for compensation under the Workmen's Compensation Laws of the State of Louisiana asserted in a district court of that state.

After hearing motions for summary judgments filed on behalf of the employee (respondent), the employer, T. Smith & Son, Inc., (petitioner), and the Deputy Commissioner, Bureau of Employee's Compensation, United States Department of Labor, the District Court, in its opinion dated June 18, 1963, printed in Appendix C hereto, infra, p. 5a, held that the respondent's suit filed in the State Court of Louisiana against petitioner for recovery under the Louisiana Workmen's Compensation Act constituted a suit for damages as contemplated by Section 913(d) of Title 33, U.S.C., and tolled the statute of limitation of one year proscribed in the Federal Longshoremen's Act. The District Court thereupon granted a summary judgment, printed in Appendix D hereto, infra, p. 10a, in favor of respondent recalling, revoking and setting aside the Deputy Commissioner's order which held that no claim had been timely filed and remanded the matter for further action consistent with such judgment, the execution of which was suspended pending the appeal taken herein by petitioner.

By stipulation of the parties, the formal hearing held before the Deputy Commissioner was limited solely to the determination of the question as to whether the formal claim filed by respondent with the Office of the Deputy Commissioner under the

Longshoremen's and Harbor Worker's Compensation Act was timely pursuant to the provisions of 33 U.S.C. 913.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the opinion and judgment of the district court and denied petitioner's application for a rehearing.

Chronologically, the significant dates and events may be summarized as follows, to-wit:

June 14, 1958 — Respondent in petitioner's employ and while performing services as a longshoreman upon navigable waters of the United States, the allegedly sustained personal injury resulting in his disability.

June 15, 1958 to April 12, 1959 — Petitioner voluntarily paid compensation to respondent pursuant to and in accordance with provisions of Longshoremen's and Harbor Workers' Compensation Act.

April 12, 1959 — Date last payment of compensation made to respondent under federal act.

April 14, 1959 — Deputy Commissioner received written notice from petitioner on Bureau's prescribed Form US-208 disclosing that compensation payments were discontinued as of April 12, 1959.

May 22, 1959 — Deputy Commissioner transmitted his Form US-212, "Important Notice to Employee," in which respondent was advised that his right to further compensation for such disability, if any, would be barred unless written claim therefor was filed within one year after date of last compensation payment.

May 22, 1959 to May 5, 1961 — No contact of whatever nature or kind made by, or on behalf of respondent with Office of Deputy Commissioner.

August 5, 1959 — Respondent filed suit in State Court of Louisiana under State Workmen's Compensation Act.

May 10, 1961 — Respondent filed formal claim for additional benefits under the Longshoremen's and Harbor Workers' Compensation Act with Office of Deputy Commissioner.

The Opinion Sought To Be Reviewed

In its opinion, approved and affirmed by the Court of Appeals, the Trial Court found that "the word 'damages' has been subject to a variety of definitions and interpretations. Here the term 'damages' should be g i v e n a general legal definition. In 25 C.J.S., Damages, Sec. 1, p. 452, it is stated that 'Damages means the compensation which the law will award for an injury done; a compensation, recompense, or satisfaction in money for a loss or injury sustained.'"

The Trial Court further reasoned that:

> "To give a narrow and restricted interpretation to the term 'damages' in this case is unwarranted. It would result in a denial to the plaintiff (by time bar) of his rights which Congress sought to give him. We have given the term 'damages' its generally accepted legal definition without expanding or restricting its meaning.
>
> "Because of the definition of 'damages' as applied by this court and the cases cited holding that suits for workmen's compensation are suits for damages, it is our conclusion that the suit filed by plaintiff in the Louisiana State Court for State workmen's compensation was a suit at law for 'damages' as that term is contemplated in the Federal statute, thereby tolling the statute of limitation of one year as provided in Title 33, Section 913(d.)"

Predicated upon the authorities urged in support of the contentions hereinafter presented, we respectfully submit that the reasoning and logic of the District Court and Court of Appeals are erroneous.

Prescription Not Interrupted

Did the filing of the State Court proceedings interrupt prescription? This precise issue was presented to the United States District for the Eastern District of Louisiana in *Dawson v. Jahncke Drydock*, D. C. La., 1940, 33 F. Supp. 668. and was decided contrary to the decisions herein. In considering the applicabili-

ty of 33 U.S.C. 913(d), the Court held therein that the one year limitation peovided for in 33 U.S.C. 913(a) on a claim for compensation was not tolled, or suspended by the state court proceedings which sought recovery of compensation under the State of Louisiana Workmen's Compensation Act for the reason that such action was not a "suit at law or in admiralty for damages." In *Dawson vs. Jahncke Drydock*, supra the Court additionally observed that:

> "The finding of the Deputy Commissioner now under review, i.e., that 'the right to compensation for the death of Robert Dawson is barred,' is manifestly correct; such finding, being supported by substantial evidence, and being in accordance with law as it now exists, should be sustained; it is conclusive upon the court. Neither the Deputy Commissioner nor this court has the power to legislate and nothing short of legislation, changing the present legal status so as to make it fit into the complainant's contentions could justify the granting of the relief sought."

The same principles were enunciated in the case of *Romaniuk vs. Locke*, D.C. N.Y. 1932, 3 F. Supp. 529.

Courts Should Not Legislate

As recognized in *Patterson v. Sears-Roebuck & Co.*, 196 F. 2d 947, those claiming benefit of statutory rights and remedies must bring themselves precisely within them and cannot extend or enlarge them beyond the statute's terms, and an action based en-

tirely upon a statute must find its warrant in the statute. The Courts cannot, upon the pretense of construing a statute enlarge its coverage to bring within it those not expressly, or by clear intendment embraced within its terms. *U. S. v. Stephens,* 208 F. 2d 105, 41 A.L.R. 2d 441.

Statutes must be construed as they are written, and Courts cannot rewrite them to suit their views of what they think statutes ought to say. *Arkansas Oak Flooring Co. v. Louisiana & A. Ry. Co.,* 166 F. 2d 98, cert. denied 68 S. Ct. 1338, 334 U.S. 828, 92 L. Ed. 1756. Furthermore, as held in *Story vs. Snyder,* 184 F 2d 454, 87 U. S. App. D. C. 96, cert. denied 71 S. Ct. 88, 340 U. S. 866, 95 L. Ed. 362, the judicial function does not encompass the rewriting of a statute so that it will authorize what the Court thinks should be authorized.

Statutory language must be construed as written, *Kent v. Rothensies,* 120 F. 2d 476, cert. denied 62 S. Ct. 113, 314 U. S. 659, 86 L. Ed. 528, and where the language of a statute is transparent, with its meaning clear, there is no room for office of construction, and there should be no construction where there is nothing to construe. *U. S. v. Turner,* 246 F. 2d 228. The Courts should ascertain — neither to add nor subtract, neither to delete nor to distort — congressional legislation and intention. *C.I.R. vs. Mercantile Nat'l Bank at Dallas,* 5 Cir.-1960, 276 F. 2d 58.

The Courts of Appeals for the Ninth Circuit, in the case of *Kobilkin v. Pillsbury et al,* 103 F. 2d 667, 670, affirmed 60 S. Ct. 465, 309 U. S. 619, 84 L. Ed. 983, found thusly:

> "It was the manifest Congressional intent to deny compensation in all cases of disability arising from accidental injury unless claim is filed within the time limited. No provision is made for exceptional cases. We agree that the act is to be liberally construed, but neither the deputy commissioner nor the courts have the power to legislate . . . "

Meaning And Application of 33 U. S. C. 913(d)

Consideration shall now be afforded the provisions of 33 U.S.C. 913(d) with a view toward ascertaining the meaning and application thereof and the intention of Congress in enacting them. This section provides:

> "Where recovery is denied to any person, in a *suit* brought *at law* or in admiralty *to recover damages* in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit." (Emphasis supplied.)

We respectfully submit that the District Court and Court of Appeals erroneously equated the state suit for workmen's compensation with a suit for damages within the meaning and operation of this section for the reason that they failed to correctly interpret the

significance of the phrase "suit . . . at law . . . to recover damages" which petitioner urges is restrictive in its application and limited to common law actions and is exclusive of statutory proceedings.

In order to invoke such provisions and apply them to a given case, each of the ground specified therein must exist conjunctively. To ascertain under what circumstances Congress intended this Section to apply, consideration should be afforded the entire Act, and particularly Section 905 of Title 33, United States Code, which we represent is complementary to Section 913(d) and should be analyzed so that the purpose of the latter Section may be determined and the true significance of the phrase, "suit brought at law or admiralty to recover damages" be ascertained:

Section 905 of Title 33, U.S.C., provides:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on

> account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

In considering the two aforesaid sections, we believe it is readily discernible that Section 905 has reference to tort actions for damages in those specific instances where the employer has failed to secure the payment of compensation as required by the Federal Longshoremen's and Harbor Workers' Compensation Act, and that Section 913(d) refers to actions of those same type which have been resolved against the employee on each of the grounds specified in Section 913(d). In *Ayers v. Parker*, 15 F. Supp. 447, the Court observed that "a consideration of the kind of suits contemplated by Section 13(d) of the Act makes it all the more certain that claims for (state) compensation were not intended to be embraced therein" and pointed out that Section 13(d) included actions which had been brought under federal statutes and dismissed, citing as examples thereof actions instituted under the Federal Employers' Liability Act and the Jones Act, as well as suits wherein the issue was whether the employee was a master or a member of the crew of a vessel or suits in which jurisdictional questions such as those in connection with marine railroads or drydocks were presented for determination.

Accordingly, we respectfully submit that the provisions of 33 U.S.C. 913(d) were intended to have but limited application.

Distinction Between Damages And Compensation

In reality, Corpus Juris Secundum, which was cited with approval in the opinions rendered herein, clearly distinguishes the term "damages" from that of "compensation," for in Vol. 99 thereof, at page 53 under the caption "Workmen's Compensation" is found:

> "DISTINCTION FROM DAMAGES.
>
> "The theory of the compensation act is distinct from the theory of damages.
>
> "The compensation acts are based on a new theory of compensation distinct from the previously existing theories of damages, payments under the acts being made as compensation and not as damages."

In *Alaska Packers Association v. Industrial Accident Commission of State of California*, 55 S. Ct. 518, 294 U. S. 532, this Court determined that:

> "Liability under a Workmen's Compensation Act is not for a tort, but is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer."

The Supreme Court of Alabama, in *Pound v. Gelding*, 187 So. 468, 237 Ala. 387, held:

> "Workmen's Compensation Statutes are sui generis and create rights, remedies and procedures all their own based on a new theory of compensation distinct from previously existing theories of damages and are not rested upon any theory of wrongful conduct or neglect of employer."

State Compensation Acts are based on a theory entirely distinct from the previously existing theory of damages arising out of a tort or breach of contract *and a claim for compensation under a compensation act is not a claim for damages* for injuries to person or property. *City of Brunswick v. King*, 14 S. E. 2d 706, 65 Ga. App. 4; *Alabama By-Products Co. v. Landgroff*, 27 So. 2d 209, aff'd 27 So. 2d 215, Ct. App. Ala.

Kentucky similarly recognized such a distinction, for in *Warner v. Lexington Roller Mills*, 206 S. W. 2d 471, 306 Ky. 142, the court stated:

> "In deciding this question, it is necessary to consider the objective of the workmen's compensation law; such law is not designed to give the employee 'damages' for his injuries. Its purpose is to compensate for lost earning power."

Proceedings under workmen's compensation acts are not suits by which "damages" are recovered, but

are, rather, suits for "compensation." *Pennsylvania Turnpike Comm. v. U. S. F. & G. Co.* 23 A 2d 416, 343 Pa. 543; *Burlington Mills Corp. v. Hagood*, 13 S. E. 2d 291, 177 Va. 204.

The Supreme Court of Louisiana, in *Rylander v. T. Smith & Son, Inc.*, 149 So. 434, 435, 177 La. 716, found that:

> "The workmen's compensation statute is not a statute allowing the workman *damages* for injuries sustained in the course of his employment even through the negligence or fault of his employer. It is essentially insurance against the loss or diminution of earning capacity . . . " (Emphasis that of the Court.)

Similar expressions and views as those outlined hereinabove have been made by courts in the States of Massachusetts, Montana, Oklahoma, Tennessee, Arizona, South Carolina, South Dakota, Minnesota, and Wyoming reported in the cases of *Charon's Case*, 76 N. E. 2d 511, 321 Mass. 694; *House v. Anaconda Copper Mining Co.*, 126 P. 2d 814, 113 Mont. 406; *Cameron & Henderson v. Franks*, 184 P. 2d 965, 199 Okla. 143; *Mathis v. J. L. Forrest & Sons*, 216 S. W. 2d 967; *Sorenson v. Six Companies*, 85 P. 2d 980, 53 Ariz. 83; *Brown v. Town of Patrick*, 24 S. E. 2d 365, 202 S. C. 236; *Benson v. Sioux Falls Medical & Surgical Clinic*, 252 N. W. 864, 62 S. D. 324; *Gleason v. Ring*, 297 N. W. 720, 210 Minn. 253; and *Fuhs v. Swenson*, 131 P. 2d 293, 58 Wyo. 293.

The United States Court of Appeals for The Second Circuit, in *Erie R. Co. v. Linnekogel,* 248 F. 389, likewise appreciated and recognized the distinction contended herein, and in its opinion therein observed:

> "It is the essential nature of any compensation act that it does not depend upon or is not invoked as the result of an act of negligence. What is assured to the workmen thereby is not compensatory damages for a tort, but a species of insurance against hurts received in the line of occupation, without (perhaps) anybody's fault."

Accordingly, it is respectfully represented that the suit filed by respondent in the Louisiana State Court for State Workmen's Compensation was not a suit at law for "damages" as contemplated in 33 U.S.C. 913(d).

Reasons For Granting The Writ

The language of Section 913(d) of Title 33, United States Code is admittedly ambiguous, with its legislative history offering no assistance in its analysis and interpretation, and the issue presented herein is one which has not been heretofore presented and decided by any Federal Appellate Court.

The fundamental significance of the question presented in the interpretation, application, and administration of such an important act of Congress as the Longshoremen's and Harbor Workers' Compensation Act requires, we believe, this Court's definitive interpretation thereof.

Additionally, it is respectfully submitted that the decisions of both the district court and Court of Appeals fail to apply the law of the State of Louisiana as enunciated by its Supreme Court and are in apparent conflict with the views and expression of the United States Court of Appeals for the Second Circuit.

I.

Decisions Below Raise Important Questions in the Administration and Construction of the Longshoremen's and Harbor Workers' Compensation Act.

The importance and significance of the holding in this case is amply demonstrated by the fact that the Solicitor General of the United States, through the Department of Justice, after causing the appeal originally taken to the United States Court of Appeals for the Fifth Circuit on behalf of the Deputy Commissioner to be dismissed, sought to present his views in support of the judgment of the district court. It should be noted that such views drastically changed, together with the position of the Justice Department, after the notice of appeal was filed on behalf of the Deputy Commissioner, but in view of the importance of the question presented herein, no objection was urged by petitioner to the Justice Department submitting its contentions herein in effect as *amicus curiae*.

As recognized by the Justice Department (p. 7 of its brief filed with the Court of Appeals), "the issue is not free from difficulty. The language of Sec. 13(d) is ambiguous, and the legislative history appears to

shed no light on the problem. The issue is one as to which district courts have disagreed, and has not previously been decided in any Federal Appellate Court."

Since the Department of Justice concedes (p. 18 of its brief) that the term "damages" may reasonably be read either to exclude or to include claims for compensation benefits, the resolution of such ambiguity by this Court, we submit, is necessary from an administrative point of view.

In *Czaplicka v. The S.S. Hoegh Silvercloud*, 76 S. Ct. 946, this Court granted certiorari, 350 U.S. 872, 76 S. Ct. 118, because of the importance of the questions presented therein in the administration of the Longshoremen's and Harbor Workers' Compensation Act. Similarly, *McKinney v. Missouri-Kansas-Texas R. R. Co.*, 78 S. Ct. 1222, 357 U.S. 265, 2 L. Ed. 2d 1305 (involving the Universal Military Training and Service Act); *Lawlor v. National Screen Service Corp.*, 75 S. Ct. 865, 349 U.S. 322, 99 L. Ed. 1122 (enforcement of federal anti-trust laws); *Schilling v. Rogers*, 80 S. Ct. 1288; *Wisconsin v. Federal Power Commission*, 83 S. Ct. 1266; *Brotherhood of Locomotive Engineers v. Louisville & N. R. R. Co.*, 83 S. Ct. 1059, 373 U.S. 33, 10 L. Ed. 2d 172.

As evidenced by the decisions of this Court in the cases of *Communist Party of U.S. v. Subversive Activities Control Board*, 81 S. Ct. 1357, 367 U.S. 1, 6 L. Ed. 2d 625, rehearing denied, 82 S. Ct. 20, 368 U.S. 871, 7 L. Ed. 72, and *U.S. v. Hougham*, 81 S. Ct. 13, 364 U.S. 310, 5 L. Ed. 2d 8, rehearing denied, 81 S. Ct. 376, 364 U.S. 938, 5 L. Ed. 2d 372, important questions

of construction and interpretation of federal statutes are sufficient to justify and warrant the issuance by it of writs of certiorari. Particularly is this true when the administration of such statutes is vested in administrative bodies.

In *National City Bank of N.Y. v. Republic of China*, 75 S. Ct. 423, and *Times-Film Corp. v. City of Chicago*, 81 S. Ct. 391, 365 U.S. 856, 5 L. Ed. 2d 820, the first appearance of an important question warranted the granting of certiorari, and in the more recent case of *International Ass'n of Machinists, AFL-CIO v. Central Airlines, Inc.*, 83 S. Ct. 956, certiorari was granted to consider the important question of whether a suit to enforce an award of an airline system board of adjustment was a suit arising under the laws of the United States or a suit arising under a law regulating commerce. We believe that such question is analogous to that presented herein for adjudication and warrants this Court's determination thereof.

Being mindful of the need for a clear, concise and definitive interpretation of the provisions governing coverage under the Longshoremen's and Harbor Workers' Compensation Act, this Court granted certiorari in *Calbeck v. Travelers Ins.* Co., 82 S. Ct. 1196, 370 U.S. 114, 8 L. Ed. 2d 368, which is precisely that which is sought herein.

We respectfully represent that because of the fundamental significance of the issue involved herein in the application of such an important act of Congress as the Longshoremen's And Harbor Workers' Compensation Act, this Court should accept the review and consideration thereof.

II.

Decisions Below Fail to Apply the Law of the State of Louisiana.

It is submitted that the district and appellate courts erred in failing to apply the law of the State of Louisiana as enunciated by the Supreme Court of Louisiana in *Rylander v. T. Smith & Son, Inc.*, 149 So. 434, 177 La. 716 wherein it was recognized that a proceeding under the state workmen's compensation act *is not a suit for damages.* Therein, it was stated that:

> "The workmen's compensation statute is not a statute allowing the workman *damages* for injuries sustained in the course of his employment even through the negligence or fault of his employer. It is essentially insurance against the loss or diminution of earning capacity."

The decisions complained of herein further erred in failing to recognize that the Workmen's Compensation Act of the State of Louisiana merely sets forth the procedural manner in which a claimant thereunder may assert his claim and have it judicially determined by a court of law, which procedure is analogous to, and identical with that of most states which, by statutory provisions, provide for administrative proceedings for workmen's compensation claims, subject to review by their courts.

Petitioner submits, and urges that just as the institution of such administrative proceedings does not

constitute a "suit brought at law or in admiralty to recover damages" so as to fall within the scope and operation of 33 U.S.C. 913 (d), neither should the respondent's state court proceedings be decreed to be of such a nature to be included within the purview and scope of the aforesaid section.

III.

Apparent Conflict with Second Circuit and Equitable Considerations.

As commented upon hereinbefore, the United States Court of Appeals For The Second Circuit in *Erie R. R. Co. v. Linnekogel*, supra, made the following cogent observation that:

> "It is the essential nature of any compensation act that it does not depend upon or is not invoked as the result of an act of negligence. What is assured to the workmen thereby is not compensatory damages for a tort, but a species of insurance against hurts received in the line of occupation, without (perhaps) anybody's fault."

We believe that it is not unreasonable to conclude therefrom that the Second Circuit, having expressed such views, determined that a proceeding instituted under a compensation act is not a suit for damages. Accordingly, the opinions in the case at bar are contrary and in conflict therewith necessitating a determination of this Court.

Should petitioner's application herein be denied, this Court would be sanctioning the actions of the respondent who freely accepted voluntary compensation payments from petitioner under the provisions of the Longshoremen's and Harbor Workers' Act from June 15, 1958 to April 12, 1959 at $54.00 per week and who, when such payments were discontinued after appropriate notices to, and by the Deputy Commissioner, then sought additional sums from petitioner under the Workmen's Compensation Act of the State of Louisiana. Failing to recover another award thereunder, respondent then (more than two years later) endeavored to assert a claim for additional compensation benefits under the federal act for the identical injury for which he had previously received payments.

It is respectfully represented that this is not a question of remedial legislation as our opponents would have the Court believe. Respondent was voluntarily paid compensation by petitioner pursuant to the federal act for an alleged injury sustained in employment clearly covered solely by the federal act. The payments made thereunder were discontinued strictly in accordance with its provisions, and all required notices were given by petitioner and the Deputy Commissioner to the respondent. Having been notified by the Deputy Commissioner that his claim, if any, for additional compensation would prescribe within one year thereafter unless he filed a written claim therefor within such period, and having failed to do so, respondent cannot, nor should he be permitted to urge that the courts should apply jurisprudence with respect to "remedial legislation" so as to bring him within the scope of the act. The claim of

respondent was properly recognized as falling within the purview of the federal act, but due to his own inaction, he failed to avail himself of its remedies and should not now be heard to complain.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

Virgil M. Wheeler, Jr.

of

SEHRT, BOYLE & WHEELER
712 American Bank Building
New Orleans, Louisiana
70130

Counsel for Petitioner

Dated: May 7, 1964.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served by mail this 7th day of May, 1964 upon Max Zelden, National Bank of Commerce Building, New Orleans, Louisiana, counsel of record for respondent herein and upon David L. Rose, Attorney, U. S. Department of Justice, Washington, D.C., by depositing same in a United States mail box at New Orleans, Louisiana, in an envelope addressed to each of said counsel as aforesaid with sufficient postage prepaid.

Virgil M. Wheeler, Jr.
Counsel for Petitioner

Dated: May 7, 1964.

Appendix A

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 20837

T. SMITH & SON, INC.,
Appellant,

versus

WILLIE WILSON, and P. J. DONOVAN, Deputy Commissioner,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 3, 1964.)

Before HUTCHESON and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: This is an appeal from an order granting summary judgment for plaintiff for the reasons for judgment set out in the district judge's opinion.[1]

[1] Wilson v. Donovan, Dep. Comm., etc., 218 F.Supp. 944.

Of the clear opinion that the district judge's order should be affirmed, for the reasons that he gave, we approve his opinion and affirm his judgment.[2]

AFFIRMED.

---

[2]See 15 Am. Jur. 387, Sec. 2; Restatement of the Law of Contracts, p. 498 Sec. 326; Aetna Cas. & Ins. Co. v. Jordan, 352 SW(2) 75; Employers Mut. Liability Ins. Co. v. DeBruin, 271 Wis. 412, 73 NW(2) 479; Hagenah v. Lumbermen's Mut. Cas. Co., 5 NW(2) 760; Texas & Pac. Ry. Co. et al v. City of Marshall, 136 U.S. 393; Miller v. Weller, 288 F(2) 438; Scott v. Donal, 165 U.S. 58; Paterson v. Sears-Roebuck & Co., 196 F(2) 947.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20,837

D. C. Docket No. 12,975 Civil

T. SMITH & SON, INC.,

Appellant,

versus

WILLIE WILSON and P. J. DONOVAN, Deputy Commissioner,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HUTCHESON and BELL, Circuit Judges, and BREWSTER, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

March 3, 1964

Issued as Mandate:

Appendix C

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

Willie Wilson

Plaintiff

versus

No. 12975

CIVIL ACTION
DIVISION D

P. J. DONOVAN, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor, and T. SMITH & SON, INC.

Defendants

Zelden and Zelden
Max Zelden
Attorneys for Plaintiff

Gene S. Palmisano, Assistant United States Attorney
Attorney for P. J. Donovan

Sehrt, Boyle and Wheeler
Virgil M. Wheeler, Jr.
Attorneys for T. Smith & Son, Inc.

AINSWORTH, District Judge:

Plaintiff was injured on June 14, 1958, while working as a longshoreman for T. Smith & Son, Inc., and while aboard a vessel afloat on navigable waters of the United States. He was paid compensation under the Federal Longshoremen's Act (33 U.S.C.A. 901, et seq.) at $54.00 per week until April 12, 1959. Thereafter, on August 6, 1959, he filed suit in the Civil District Court, Parish of Orleans, State of Louisiana, for Louisiana workmen's compensation on account of said injury, which matter is still pending and apparently will not be purused because of the adverse decision of the Louisiana Supreme Court in *Ellis v. Travelers Insurance Company*, 1961, 241 La. 43, 129 the Federal Longshoremen's Act. On May 10, 1961, So. 2d 729, which held that a longshoreman injured while working on board an ocean-going vessel afloat on navigable waters may not claim Louisiana workmen's compensation but is limited to a claim under the Federal Longshoremen's Act on May 10, 1961, formal claim was filed by plaintiff with the Deputy Commissioner for benefits under the Federal Longshoremen's Act. (See Stipulation of the parties.)

This matter is before us on motions for summary judgment filed by plaintiff and by the two defendants.

There is no dispute as to the present facts which are based on the record in Case No. 2-6870 pending before defendant Deputy Commissioner Donovan. The question presented here is whether an employee suit filed in a Louisiana State Court against an employer for recovery under the Louisiana Workmen's

Compensation Act is a suit for damages as contemplated by Title 3, U.S.C.A., Section 913 (d), sufficient to toll the statute of limitation of one year in claims under the Federal Longshoremen's Act. The claim was not filed with the Deputy Commissioner until more than two years after receipt of the last compensation payment. Section 913 (d) reads as follows:

> "Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect to injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.' "

The word "damages" has been subject to a variety of definitions and interpretations. Here the term "damages" should be given a general legal definition. In 25 C. J. S., Damages, § 1, p. 452, it is stated that "Damages means the compensation which the law will award for an injury done; a compensation, recompense, or satisfaction in money for a loss or injury sustained." This definition was quoted with approval and applied in the case of *Employers Mutual Liability Insurance Co. vs. DeBruin*, 271 Wisc. 412, 73 N. W. 2d 479 (1955).

A suit for workmen's compensation is one in which a party seeks to recover an award which is provided by the law for his injury or loss. *Employers Mutual Liability Insurance Co. v. DeBruin*, 271 Wis. 412, 73 N. W. 2d 479

(1955). *Hagenah v. Lumberman's Mutual Casualty Co.*, 241 Wis. 226, S. N. W. 2d 760 (1942), and *Aetna Casualty & Surety Co. v. Jordan*, 352 S. W. 2d 75 (1961), hold that a suit under a Workmen's Compensation Act is a suit for damages. In the *Hagenah* case it is said that the words "damages" and "compensation" are used interchangeably, citing as an example the case of *Texas & P. Ry. Co. et al v. City of Marshall*, 1890, 136 U. S. 393, 405, 10 S. Ct. 846, 849, 34 L. Ed. 385, where the United States Supreme Court used "compensation" and "damages" to refer to the same concept, that of damages. In *Patterson v. Sears-Roebuck & Co.*, 5 Cir., 1952, 196 F. 2d 947, 949, the court, in speaking of a suit brought for wrongful death, said:

> "This is: that the act (Alabama Workmen's Compensation Act) intends to and does, provide the exclusive remedy for death *damages* in case of employe-employer injuries."

With due deference and respect for our late brother, Judge Caillouet, this court is in disagreement with his statement in *Dawson v. Jahncke Drydock*, D. C. La., 1940, 33 F. Supp. 668, that a suit under the State Workmen's Compensation Act is not a suit at law for damages sufficient to toll limitation in a claim for Federal Longshoremen's benefits. No authority is cited in support of his view.

To give a narrow and restricted interpretation to the term "damages" in this case is unwarranted. It would result in a denial to the plaintiff (by time bar)

of his rights which Congress sought to give him. We have given the term "damages" its generally accepted legal definition without expanding or restricting its meaning.

Because of the definition of "damages" as applied by this court and the cases cited holding that suits for workmen's compensation are suits for damages, it is our conclusion that the suit filed by plaintiff in the Louisiana State Court for State workmen's compensation was a suit at law for "damages" as that term is contemplated in the Federal statute, thereby tolling the statute of limitation of one year as provided in Title 33, Section 913 (d).

Accordingly, there will be summary judgment herein in favor of plaintiff recalling, revoking and setting aside compensation order dated November 26, 1962 in Case No. 2-6870 of defendant P. J. Donovan, Deputy Commissioner, who is enjoined from further carrying out said order; and this matter is remanded to the Deputy Commissioner for further action consistent with this opinion.

The motions for summary judgment of defendants P. J. Donovan, Deputy Commissioner, and T. Smith & Son, Inc. are denied.

Original Signed

Robert A. Ainsworth, Jr.
United States District Judge

New Orleans, Louisiana
June 18, 1963

Appendix D

United States District Court, Eastern District of Louisiana, New Orleans Division

Willie Wilson

versus No. 12975

DIVISION D
CIVIL ACTION

P. J. DONOVAN, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor and T. Smith and Son, Incorporated.

J U D G M E N T

Considering the written reasons of the Court filed herein on June 18, 1963:

IT IS ORDERED, ADJUDGED AND DECREED that there be summary judgment herein in favor of plaintiff, Willie Wilson, and against defendants, P. J. Donovan, Deputy Commissioner, Seventh Compensation District, Bureau of Employees' Compensation, U. S. Department of Labor and T. Smith and Son, Incorporated, recalling, revoking and setting aside compensation order dated November 26, 1962 in Case No. 2-6870 of defendant, P. J. Donovan, Deputy Commissioner, who is enjoined from further carrying out said order; and this matter is remanded to

the Deputy Commissioner for further action consistent with the Opinion of the Court.

New Orleans, Louisiana.
June 20, 1963.
ROBERT A. AINSWORTH, JR.
United States District Judge

Max Zelden, Esq.
Sehrt, Boyle & Wheeler
Gene S. Palmisano, Esq., Assistant U. S. Attorney

Appendix E

On Petition for Rehearing

In the United States Court of Appeals for the Fifth Circuit

No. 20837

T. SMITH & SON, INC.,
Appellant

versus

WILLIE WILSON and P. J. DONOVAN,
Deputy Commissioner

Appeal from the United States District Court for the Eastern District of Louisiana

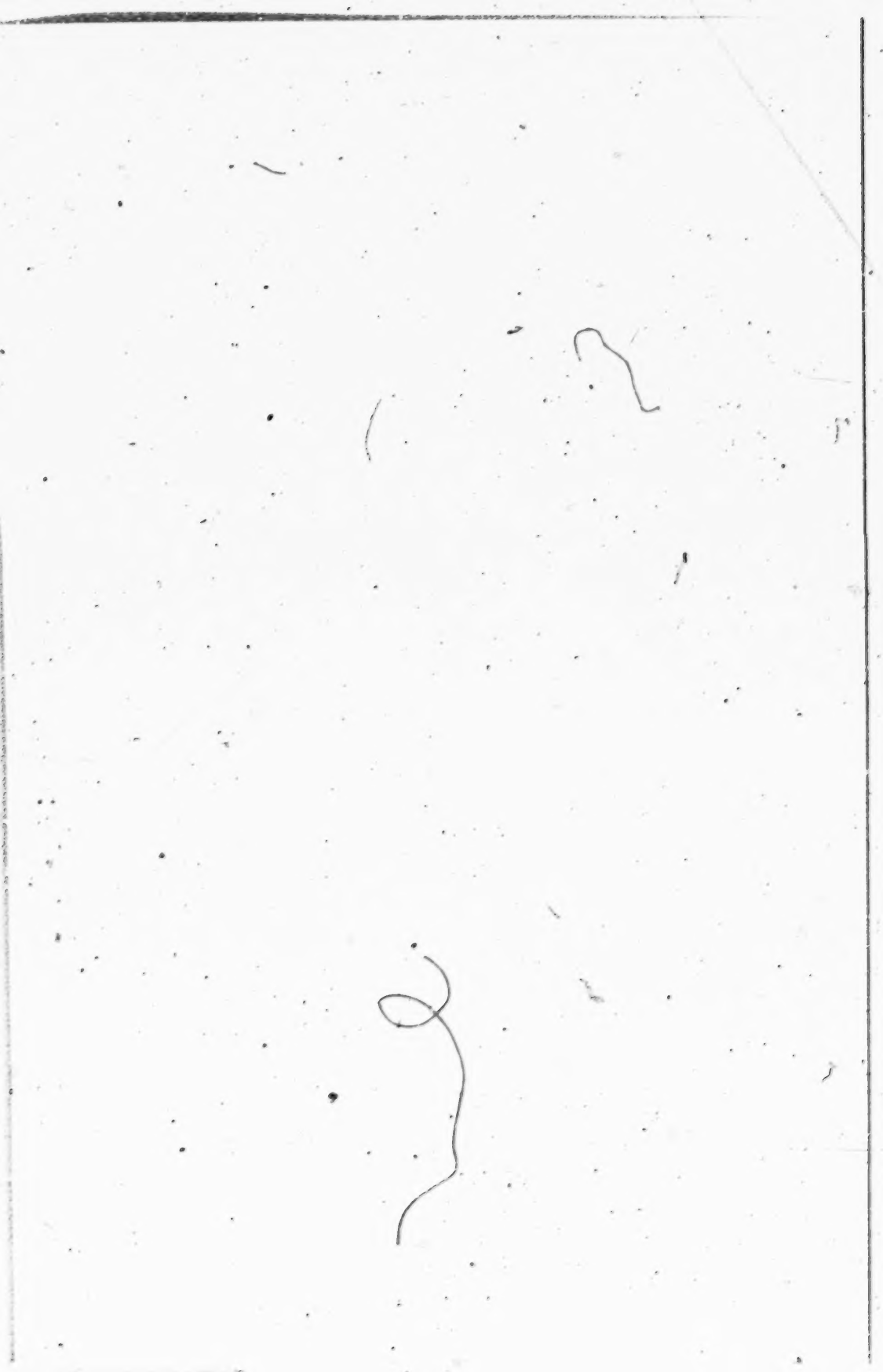
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Filed: April 3, 1964

Before HUTCHESON and BELL, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.



BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1091

T. SMITH & SON, INC., PETITIONER,

v.

WILLIE WILSON AND P. J. DONOVAN, DEPUTY COMMISSIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is reported at 328 F.2d 313. The opinion of the district court (Pet. App. 6a-9a) is reported at 218 F. Supp. 944.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1964, and a petition for rehearing was denied on April 3, 1964. The petition for a writ of certiorari was filed on May 8, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court action brought for compensation benefits under the Louisiana Workmen's Compensation Act, in which recovery is denied on the ground that claimant's exclusive remedy is under the federal Longshoremen's and Harbor Workers' Compensation Act, suspends the running of the period of limitations for filing a claim under the Longshoremen's Act.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, provides in pertinent part:

> § 913. Time for filing of claims.
>
> (a) The right of compensation for disability under this chapter shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.
>
> * * * * *
>
> (d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover

damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this chapter and that such employer had secured compensation to such employee under this chapter, the limitation of time prescribed in subdivision (a) of this section shall begin to run only from the date of termination of such suit.

§ 905. Exclusiveness of liability.

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

STATEMENT

1. The basic facts were stipulated before the Deputy Commissioner (R. 9-10),[1] and are undisputed.

Respondent Willie Wilson, a longshoreman employed by petitioner, was injured on June 14, 1958, in the course of his employment, while aboard a vessel which was afloat upon the navigable waters of the Mississippi River, at the port of New Orleans. After his employer discontinued the payment of compensation benefits, Wilson filed a suit in a Louisiana court in August, 1959, for the payment of benefits under the Louisiana Workmen's Compensation Act. Under that Act, a claim for workmen's compensation is enforced directly in a judicial action, without any prior administrative proceeding.[2] At the time suit was instituted, the Louisiana courts had held that a longshoreman was entitled to workmen's compensation benefits under the State Act, although his injury occurred on navigable waters.[3] On April 24, 1961, however, the Supreme Court of Louisiana reversed its position and held that such injuries were within the exclusive Federal maritime jurisdiction, compensable only under the Longshoremen's Act.[4]

---

[1] "R." references are to the Mimeographed Record filed in the court of appeals.

[2] La. R.S. 23:1311; *Thibodeaux* v. *McDermott & Co.*, 276 F. 2d 42, 48 (C.A. 5).

[3] *Richard* v. *Lake Charles Stevedores*, 95 So. 2d 830 (La. Ct. App.), certiorari denied, 355 U.S. 952. The Supreme Court of Louisiana had declined to review that holding on the ground that "Judgment correct." *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 456, 129 So. 2d 729, 737.

[4] *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. 2d 729, relying heavily upon *Noah* v. *Liberty Mutual Ins. Co.*, 267 F. 2d

When this decision of the Louisiana Supreme Court effectively denied recovery in Wilson's State court action [5] he filed a claim for compensation under the Longshoremen's Act with the Deputy Commissioner. This was on May 10, 1961, approximately 25 months after the receipt of the last voluntary compensation payment, but less than a year (approximately two weeks) after the decision of the Louisiana Supreme Court which barred recovery. The parties stipulated that the claim was within the coverage of the Longshoremen's Act (R. 12). However, petitioner, a self-insured employer, asserted that the claim was barred by the Longshoremen's Act's one year period of limitations, Sec. 13(a), 33 U.S.C. 913(a), *supra*, p. 2, while respondent Wilson urged that the State court action suspended the running of the period of limitations under Sec. 13(d), 33 U.S.C. 913(d), *supra*, pp. 2-3. The Deputy Commissioner accepted the employer's position, and entered an order denying the claim on the ground that it had not been timely filed.

Wilson then filed the present action in the United States District Court for the Eastern District of Louisiana. The district court reversed the Deputy Commissioner on the ground that the suit for Louisiana Workmen's compensation benefits was a suit at law for "damages" within the meaning of Sec. 13(d) of the Long-

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218 (C.A. 5). See also, *Flowers v. Travelers Insurance Co.*, 258 F. 2d 220, 226 (C.A. 5), certiorari denied, 359 U.S. 920.

[5] The State court action was never formally dismissed, but all of the parties and both courts below treated the decision of the State Supreme Court as having denied recovery in that action, and we shall do so here.

shoremen's Act, 33 U.S.C. 913(d), *supra*, pp. 2-3, and therefore suspended the running of the one year period of limitations (Pet. App. 6a-9a). Petitioner appealed. The Deputy Commissioner, whose order had been reversed, did not appeal, but participated in the appeal as an appellee, accepting the district court's decision (Pet. 18). The court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a-2a).

ARGUMENT

1. Consistent with its basic purpose "to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters" (*Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 124), the Longshoremen's Act provides that, at least in some circumstances, when an employee brings a suit at law or in admiralty against his employer based upon an employment-connected injury, and the claim is denied on the ground that it is within the exclusive coverage of the Longshoremen's Act, the running of the Longshoremen's Act's period of limitations is suspended until the termination of the suit. Sec. 13(d), 33 U.S.C. 913(d), *supra*, pp. 2-3. This provision ameliorates the harshness of the Act's one year statute of limitations [6] and its exclusivity provisions [7] by preserving the claimant's rights under the Act when he erroneously pursues another remedy.

The liberal purpose of this provision is served by the holding of the court below. Since the benefits

[6] Sec. 13(a), 33 U.S.C. 913(a), *supra*, p. 2.

[7] Sec. 5, 33 U.S.C. 905, *supra*, p. 3.

granted by the Louisiana workmen's compensation statute are directly enforceable in court, without any administrative investigation, proceeding or hearing, and the claimant has the burden of proving, by competent evidence, that he is entitled to relief,[8] an action to enforce such rights is concededly a "suit" within the meaning of Sec. 13(d).[9] And since Sec. 13(d) suspends the period of limitations both for suits "at law" and "in admiralty," the absence of a jury in the Louisiana suit for workmen's compensation is immaterial.

Petitioner's reading of Sec. 13(d) is based upon its contention that the Louisiana suit was not for "damages" within the meaning of Sec. 13(d), because "compensation" and "damages" are mutually exclusive terms (Pet. 14-17). It is of course true that the two words are sometimes used in context as being mutually exclusive, with "compensation" referring to awards of workmen's compensation benefits, and "damages" to awards for common law negligence. But it is also true that the two overlap. Thus damages for personal tort injuries are usually "compensation" for losses suffered,[10] while benefits under workmen's compensation statutes are sometimes described as "damages."[11]

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[8] La. R.S. 23:1311; *Thibodeaux* v. *McDermott & Co.*, 276 F. 2d 42, 48 (C.A. 5).

[9] An action for Louisiana workmen's compensation benefits is cognizable in Federal courts under diversity jurisdiction. *E.g.*, *Thibodeaux* v. *McDermott & Co.*, *supra*; *Millet* v. *Godchaux Sugars*, 241 F. 2d 264.

[10] *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 132-133.

[11] *Patterson* v. *Sears-Roebuck & Co.*, 196 F. 2d 947, 949 (C.A. 5).

and policies insuring for liability against "damages" have been held to cover compensation claims.[12]

The term "damages," therefore, may reasonably be read either to exclude or include claims for workmen's compensation benefits. In these circumstances the courts below were warranted in resolving the ambiguity in favor of broad interpretation of that Section so as to effectuate the liberal purposes of the Act and the specific purpose of Sec. 13(d). The only other appellate decision which we have found in point followed these principles, and held that a court action for Louisiana workmen's compensation benefits was an action for "damages" sufficient to suspend the running of the period of limitations under an analogous provision of a state compensation statute. *Aetna Casualty & Surety Co.* v. *Jordan,* 234 Ark. 339, 352 S.W. 2d 75.[13]

2. The decision of the courts below as to the scope of Sec. 13(d) is of limited application and importance. To the best of our knowledge, there are only two prior reported decisions on the subject, both by district courts and both of them rendered prior to the announcement of the "twilight zone" doctrine of overlapping State and federal compensation remedies. *Davis* v. *Dept. of Labor,* 317 U.S. 249. See footnote 13, this page. The absence of post-*Davis* decisions denying compensation on the ground that an employee pursued the

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[12] *Hagenah* v. *Lumbermen's Mutual Casualty Co.*, 241 Wis. 226, 234, 5 N.W. 2d 760, 763, and cases cited.

[13] Petitioner's reading of Sec. 13(d) is supported by *Dawson* v. *Jahncke Drydock*, 33 F. Supp. 668 (E.D. La.) and *Ayers* v. *Parker*, 15 F. Supp. 447 (D. Md.).

wrong remedy attests to the effectiveness of the twilight-zone doctrine in avoiding such harsh results.

The decision below applies only to court suits for the recovery of benefits under the Louisiana Workmen's Compensation Act. This case therefore does not present the question of whether administrative proceedings for compensation, and related proceedings for judicial review, under the more usual State workmen's compensation statutes toll the period of limitations.[14] Except for the few claimants who, like respondent Wilson, were caught by the Louisiana Supreme Court's change of position,[15] we are aware of no pending claims under the Longshoremen's Act which would be affected by the decision in the case at bar.

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[14] See *Romaniuk* v. *Locke*, 3 F. Supp. 529 (S.D. N.Y.) holding that such administrative proceedings do not toll the statute.

[15] See *supra*, p. 4.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

JUNE, 1964.

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